

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 13
)	
DEBORAH ANNETTE WHITAKER,)	CASE NO. 04-90810 - MHM
)	
Debtor.)	
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DEBORAH ANNETTE WHITAKER,)	ADVERSARY PROCEEDING
)	NO. 09-9000
Plaintiff,)	
)	
v.)	
)	
EMC MORTGAGE CORPORATION,)	
)	
Defendant.)	

**ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

This adversary proceeding is before the court on Defendant's motion for summary judgment. Plaintiff, who is proceeding *pro se*, filed responses opposing Defendant's motion. Oral argument on the motion was held June 8, 2011, at which Plaintiff was present *pro se* and Defendant appeared through its attorney.

STATEMENT OF FACTS

Debtor filed her Chapter 13 bankruptcy petition *pro se* February 2, 2004. She completed payments under her Chapter 13 plan and received a discharge January 21, 2009. Debtor owns a residence located at 862 Oakhill Court, Stone Mountain, Georgia, which secures a mortgage owed to LaSalle Bank National Association as Trustee for Certificateholders of EMC Mortgage Loan Trust 2005-a, Mortgage Loan Pass-through

Certificates, Series 2005-a ("LaSalle"). EMC Mortgage Corporation, Plaintiff in this adversary proceeding, is LaSalle's Servicing Agent.

While Debtor's bankruptcy case was pending, Defendant filed four motions for relief from stay, three of which were not prosecuted. During negotiations between Defendant and Plaintiff with respect to one of those first three stay relief motions, Plaintiff and Defendant agreed to a loan modification and written agreements memorializing their agreement were executed May 13, 2008 (the "Modification"). In connection with the Modification, Debtor executed a *Release and Compromise Settlement Agreement* (the "Release"), in which she released Defendant from all claims

whether the same be now known or unknown, in existence as of the execution of this Agreement or arising in the future, for or because of any matter or thing claimed done, omitted, or suffered to be done, and which is related in any way to the Loan or the proof of claim filed by EMC in Whitaker's bankruptcy proceeding.

Debtor made the first three payments under the Modification, but after the August 2008 payment, Debtor made no further payments. On November 26, 2008, Defendant filed its fourth motion for relief from stay, seeking relief from the stay due to Plaintiff's failure to make payments under the Modification (Doc. No. 48). On January 8, 2009, Debtor filed this adversary proceeding. By order entered January 20, 2011, following a hearing at which Plaintiff and Defendant's attorney were present, an order was entered granting Defendant relief from the stay. Debtor's discharge was entered January 21, 2011, and the main bankruptcy case was closed February 13, 2009.

In this adversary proceeding, Plaintiff challenges the Modification, alleging that during the negotiation of the agreement, Defendant agreed to remove certain charges Defendant had made to her loan account, agreed not to add such charges to her account in the future, and agreed to provide an escrow analysis, but that Defendant failed to fulfill those

promises. Plaintiff asserts that, by these failures, Defendant breached the parties' agreement and fraudulently induced Plaintiff to enter into the Modification, depriving Plaintiff of her "fresh start." Plaintiff seeks rescission and damages.

Following denial of its motion to dismiss, Defendant filed an answer to Plaintiff's amended complaint, and following the close of discovery, Defendant filed a motion for summary judgment, to which Plaintiff filed a response. Defendant filed a reply to Plaintiff's response, to which Plaintiff filed a surreply¹ and, the day before oral argument on Defendant's summary judgment motion, Plaintiff filed a "Motion Fraud on the Court," in which she raised issues regarding the validity of several of the loan documents. Defendant objects to consideration of both Plaintiff's surreply and Plaintiff's "Motion Fraud on the Court."

In the motion for summary judgment, Defendant shows that the original note and security deed on the Property were executed February 9, 1999, in the original principal amount of \$84,000. Post-petition, after Defendant, on behalf of LaSalle, moved for relief from the stay, Plaintiff and Defendant negotiated a loan modification in which Defendant agreed to reduce the unpaid principal balance from \$78,257.18 to \$75,858.31, and to reduce the interest rate to 6.5%. In consideration of the Modification, Plaintiff executed a release. The Modification does not mention removal of fees assessed prior to the Modification nor any agreement about assessment of fees in the future. Also, the Modification makes no mention of the account's negative escrow balance or of providing Plaintiff with an escrow analysis. Defendant shows that the principal balance and the interest rate were reduced as provided in the Modification.

Defendant also showed that during the negotiation of the Modification with Plaintiff, Plaintiff agreed to pay a negative escrow balance in the amount of \$1,554.26. Defendant also asserts that it sent the requested escrow analysis to both Plaintiff and the Chapter 13

¹ Neither the Bankruptcy Rules nor the local rules provide for a surreply. Plaintiff did not seek or obtain permission from the court to file her surreply.

Trustee July 18, 2008. On October 14, 2009, Defendant provided Plaintiff with a detailed accounting of all credits and charges to her customer account from February 2, 2005 through October 9, 2009. That detailed accounting includes charges posted to Debtor's account following August 2008, when she stopped paying the monthly mortgage payments. Defendant also shows that the loan documents provide for the assessment of such charges upon delinquency in payments by the borrower. Defendant shows that it is not required to provide escrow analyses to Plaintiff after a default in payments. 24 CFR §3500.17(i)(2).

Plaintiff's response to Defendant's motion for summary judgment raised issues not included in her complaint and not relating to any argument in Defendant's motion for summary judgment. Plaintiff's response was accompanied by unauthenticated and illegible documents whose relevance is obscure. Plaintiff produced no evidence of any agreement with Defendant apart from that set forth in Modification and the Release. Specifically, Plaintiff failed to show that any fee assessed after her default in payments in September 2008 was not authorized by the loan documents and failed to produce any evidence of any agreement by Defendant not to assess any fee following the Modification.

In Plaintiff's "Motion Fraud on the Court" filed just before oral argument, Plaintiff alleges that many of the loan documents (not including the Modification and the Release) were fraudulently executed or forged. These issues Plaintiff raises in the "Motion Fraud on the Court." were not raised in her complaint and have little bearing on the issues that she did raise or on the validity or enforceability of the Modification and the Release.

Based upon the paucity of evidence presented by Plaintiff in opposition to Defendant's motion for summary judgment, together with the terms of what appears to be an enforceable Release, *see Carey v. Houston Oral Surgeons, Inc.*, 265 Ga. App. 812, 595 S.E. 2d 633 (2004), Defendant is entitled to summary judgment. Defendant has shown that it has complied with all the terms of the Modification and that no enforceable extraneous or parole agreements were made with Plaintiff in connection with the Modification. The issues Plaintiff raised for the first time after Defendant filed the motion for summary judgment

relate to the enforceability under its loan documents of Defendant's remedies following Plaintiff's default, i.e. whether Defendant's documents were properly executed. Defendant, however, did not attempt to exercise those contractual and state law remedies while the bankruptcy case was pending and, even though Plaintiff admits that she has not made a mortgage payment since August 2008, Defendant has not yet attempted to exercise its contractual and state law remedies. As those issues are not ripe and are common law causes of action, this court is without jurisdiction to entertain those issues. *See Stern v. Marshall*, 131 S.Ct. 2594 (2011); *Jacks v. Wells Fargo Bank*, 642 F. 3d 1323 (11th Cir. 2011).

Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is *granted*. It is further

ORDERED that, to the extent Plaintiff's "Motion Fraud on the Court" is intended as a motion rather than a response to Defendant's motion for summary judgment, Plaintiff's "Motion Fraud on the Court" is *denied*.

IT IS SO ORDERED, this the 30th day of September, 2011.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE